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No. 211

In the Supreme Court of the United States

OCTOBER TERM, 1960

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

E & B BREWING COMPANY, INC., AND DRIVERS AND HELPERS LOCAL NO. 38, INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK & DISTILLERY WORKERS OF AMERICA, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
DUANE B. BEESON,
Attorney,
National Labor Relations Board,
Washington 25, D.C.

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v.

E & B BREWING COMPANY, INC., AND DRIVERS AND HELPERS LOCAL NO. 38, INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK & DISTILLERY WORKERS OF AMERICA, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit entered in this case on April 5, 1960.

OPINIONS BELOW

The decision of the Court of Appeals (Appendix, *infra*, pp. 15–27) is reported at 276 F. 2d 594. The findings of fact, conclusions of law, and order of the Board (R. 2a–21a)[1] are reported at 122 NLRB 354.

[1] References designated "B.A." are to the pages of the separately bound appendix to the Board's brief before the court below, containing portions of the record in this proceeding.

JURISDICTION

The judgment of the Court of Appeals (Appendix, *infra*, pp. 27–28) was entered on April 5, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether in the circumstances of this case, the National Labor Relations Board properly held that a labor organization and an employer had violated the provisions of the Act forbidding discrimination in employment on the basis of union membership, by carrying out an agreement which required that all applicants for employment must be approved by the union but did not provide adequate assurances that such approval would be exercised on a non-discriminatory basis.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section: * * *

* * * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership * * *.

* * * * *

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

In 1955 the E & B Brewing Company, hereafter called the Company, which is engaged in the production and distribution of beer and related products in Detroit, Michigan, executed a two-year collective bar-

gaining contract with Drivers and Helpers Local No. 38 covering, *inter alia*, the Company's truck drivers. The contract was negotiated on an industry-wide basis between Local 38 and the Detroit Brewers Association, and was separately executed by the Company (B.A. 13a; 39a). The provisions of the contract relating to hiring were as follows (B.A. 13a-14a; 61a):

> The employer agrees that in the event he shall require additional employees in the classifications of employment covered by this agreement, he shall notify the employment office operated by the Union. In the event that said employment office is unable to supply help satisfactory to the employer within twenty-four (24) hours following the request, the employer shall be free to hire in the open market. If a vacancy must be filled immediately, the employer shall nevertheless notify the employment office and if satisfactory help cannot be supplied to meet the employer's requirement the employer may hire from the open market but before filling the vacancy permanently he shall consider applicants referred by the Union within said twenty-four (24) hours. The facilities of the employment office operated by the Union shall be made available to both members and nonmembers of the Union and the Union warrants that in the operation of said employment agency and referrals to the employers, it will not discriminate against any individual applicant for employment because of nonmembership in the Union, or otherwise restrain or coerce such applicant because of nonmembership in the Union.

When an employer submits a request for an applicant—whether or not it is for a named individual—the

Union issues the individual a "working card" which is his "admission to go to work" (B.A. 44a-45a 46a). In accordance with the hiring agreement, the Union customarily honored requests by employers that specified non-members be referred for employment, and would furnish such persons working cards (B.A. 18a; 39a–40a, 44a–45a).

Thomas Pfeifle had worked for the Company during college vacation periods from 1952 to 1956 (B.A. 12a–13a; 23a–24a). He had joined the Union in 1953, and had obtained a withdrawal card in 1954 upon his return to college (B.A. 12a; 24a). Following his graduation from college in January 1957, Pfeifle obtained employment with the Company in a capacity not covered by the contract with the Union, but in February was transferred to a truck driver's job within the bargaining unit to replace a driver who was leaving (B.A. 13a; 25a, 28a). The Company did not request or obtain Union clearance for Pfeifle before making the transfer, but told Pfeifle to check his status with the Union before starting the job (B.A. 14a; 26a, 40a). When Pfeifle reported to the Union hall on February 19, he was told that his withdrawal card had expired and that as a result he had "expelled himself automatically" (B.A. 14a; 25a, 53a). Pfeifle inquired about opportunities to be referred to jobs through the hiring hall, and was told that the prospects were unfavorable because of unemployment in the industry (B.A. 14a; 27a). Pfeifle reported his experience at the Union hall to the Company's personnel manager, Frederic Rieg, and was put to work at

the truck driver's job on February 22, 1957 (B.A. 14a; 28a).

On March 8, 1957, Union business agent Harold Bondy had a series of telephone exchanges with personnel manager Rieg, in which Bondy inquired whether Pfeifle was working for the Company, and upon receiving an affirmative answer, demanded that Pfeifle be discharged (B.A. 15a; 34a–35a). Bondy stated two reasons for the demand—that Pfeifle was no longer a Union member, and that he had been hired in violation of the Union clearance provisions of the collective bargaining agreement (*ibid.*). Several days later, on March 12, the Union's President, David Lindsay, also called personnel director Rieg, and repeated the demand that Pfeifle's employment be terminated, again stating the same reasons (B.A. 15a–16a; 34a, 36a, 44a, 54a). Rieg, however, continued Pfeifle in his job.

On March 19, 1957, at the close of a meeting between the Detroit Brewers Association and the Union, which was attended by Rieg, Union business agent Bondy protested that some employers in the Association, making specific reference to the Company, were violating the contract by not using the Union hall for hiring and by not posting job openings (B.A. 16a; 36a–37a). Union president Lindsay, in the conversation that followed, also accused Rieg of violating the referral provisions of the contract (B.A. 16a; 46a). Bondy closed the conversation by stating that he intended to enforce the hiring provision of the contract and would not arbitrate the matter (B.A 16a; 37a).

On March 20, Bondy telephoned Rieg and demanded that Pfeifle be discharged by the end of the day (B.A. 16a; Tr. 98). Rieg consulted with the Company's president, and on the following morning Rieg told Pfeifle that he was being discharged because of the "pressure that the union had brought to bear" (B.A. 17a; 29a, 38a). During a final conversation with Bondy before the discharge, Rieg inquired whether the Union would honor a request from the Company that Pfeifle be referred for a job with the Company (B.A. 16a; 37a, 43a). Bondy replied that under the circumstances no such request could be complied with, but added that the Union hall would refer him to available jobs for other companies (*ibid.*).

B. THE BOARD'S DECISION AND ORDER

The Board concluded that Pfeifle was discharged, upon demand by the Union, because he had not been employed in accordance with the hiring provisions of the contract between the Company and the Union. Although the Union had also initially advanced Pfeifle's non-membership as a reason for terminating Pfeifle's employment, the Board found that on and after March 19, 1957, "the Union dropped its objection based on Pfeifle's nonmembership" (B.A. 2a).

Thus viewing Pfeifle's discharge as grounded solely on enforcement of the hiring provisions of the contract, the Board further concluded that the discharge violated the Act's proscription against discrimination in employment, as contained in Section 8(a) (1)

and (3), and 8(b) (1)(A) and (2), in that the hiring agreement did not satisfy the safeguards against unlawful discrimination specified in the Board's decision in *Mountain Pacific Chapter of the Associated General Contractors, Inc., et al.*, 119 NLRB 883, 893.[2]

In the *Mountain Pacific* case the Board determined that an unqualified hiring agreement which vested exclusive authority in a union to clear applicants for employment was unlawful. The Board reasoned that such an agreement necessarily had a coercive effect upon employees and job applicants in encouraging them "towards compliance with obligations or supposed obligations of union membership, and participation in union activities generally." 119 NLRB at 894, 895. The Board added, however, that inasmuch as the "vice in the [exclusive hiring agreement] lies in the fact of unfettered union control over all hiring," the illegality of such an agreement could be overcome if it contained the following three protective clauses: (1) a guarantee against discrimination in hiring; (2) a reservation in the employer of the right to reject any applicant referred by the union; and (3) a statement of the provisions relating to hiring, including the two clauses mentioned above, all of which must be posted for the inspection of job applicants. See 119 NLRB at 896, 897.

Since in the present case there was no provision for the posting of the procedure relating to hiring,

[2] The hiring agreement itself was not alleged to be unlawful in the complaint, and thus was considered by the Board only to the extent that it was material to the holding that Pfeifle's discharge constituted an unfair labor practice. No remedial order was entered with respect to the agreement (B.A. 4a–7a).

the Board concluded that the contract pursuant to which Pfeifle was discharged did not satisfy the requirements stated in the *Mountain Pacific* decision, and that the discharge was therefore in violation of the Act.

The Board's order (B.A. 4a–7a) requires the Company and the Union to cease and desist from the unfair labor practices found, and to reimburse Pfeifle for lost wages. In addition, the Company is required to offer him reinstatement.

C. THE DECISION OF THE COURT BELOW

The court below, denying enforcement of the Board's order, observed at the outset that the Board's order in the *Mountain Pacific* case had been denied enforcement by the Court of Appeals for the Ninth Circuit, 270 F. 2d 425. The opinion adds that the decisions of the court below in analogous cases had applied the same principle which underlay the Ninth Circuit's decision, and that the conflicting decision of the Court of Appeals for the District of Columbia Circuit in *Local 357* v. *National Labor Relations Board*, 275 F. 2d 646 (C.A. D.C.), "does not appeal to us" (*infra*, p. 19).

The court acknowledged, however, that the Board was empowered to "lay down new so-called 'interpretative' rules" respecting classes of cases which come before it, including those dealing with exclusive hiring arrangements (*infra*, p. 21). But, in the court's view, the application of the Board's *Mountain Pacific* doctrine was particularly inappropriate in this case for two reasons. First, noting that the complaint had

not alleged the invalidity of the hiring agreement itself, the court concluded that the Board had improperly attempted to "establish its * * * rule [governing exclusive hiring agreements] by an adjudication of a matter not in issue before it" (*infra*, p. 23). Second, the court, noting that the contract was "perfectly legal and valid according to the Board's settled rule at the time it was made," concluded that there was "no reason why the public interest demands that the new rule [of the *Mountain Pacific* decision] be imposed at once, and now, as to this particular contract" (*infra*, pp. 25–27). Accordingly, it held that the Board's "attempted retroactive action here was * * * 'arbitrary, capricious, and an abuse of discretion'" (*infra*, p. 27).

REASONS FOR GRANTING THE WRIT

1. The Board's decision in this case rests on an application of the rule adopted in its opinion in the *Mountain Pacific* case, 119 NLRB 883, 893. The rejection by the court below of the Board's *Mountain Pacific* doctrine as "The first infirmity in the Board's conclusion" in this case (*infra*, p. 18), presents the same question which is before this Court in *Local 357, International Brotherhood of Teamsters* v. *National Labor Relations Board*, No. 64, this Term, certiorari granted, June 27, 1960, and is raised by the Board's pending petition for certiorari in *National Labor Relations Board* v. *Hod Carriers, etc.*, No. 75, this Term. The disposition of the present case would appear to be dependent on the Court's action in the *Teamsters* case.

2. The court below, apparently as alternative grounds for its decision, concluded that the Board improperly applied its *Mountain Pacific* ruling in the present case because the invalidity of the hiring agreement had not been placed in issue by the complaint, and because a retroactive application of the *Mountain Pacific* doctrine was not warranted in the circumstances of this case. Neither of these alternative grounds is valid.

(*a*). Contrary to the view of the court below, the Board has made no "adjudication of a matter not in issue before it" (*infra*, p. 23). The violation found in this case, and the remedial order of the Board, are limited to the discriminatory discharge of Pfeifle. The theory of the violation, it is true, presupposes the invalidity of the hiring agreement, just as the theory of the defense before the Board rested upon the asserted validity of the hiring agreement. But the Board is authorized to pass on an issue which, though not directly raised by the pleadings, is indispensable to decision of the question specifically presented.

Moreover, it cannot be maintained that the respondents were not adequately apprised of the issue respecting the legality of the hiring agreement under the *Mountain Pacific* doctrine, or were not afforded opportunity to present their positions on the issue. The Board's opinion in *Mountain Pacific* was handed down shortly after issuance of the Trial Examiner's Intermediate Report in this case, and transfer of the case to the Board. The General Counsel thereupon filed a brief advancing the contention that the hiring

agreement in this case did not constitute a defense to Pfeifle's discharge because it was invalid under the *Mountain Pacific* decision. Respondents then had opportunity, of which the Union availed itself, to present opposing arguments on this issue. Since the Board's *Mountain Pacific* doctrine is a rule of law, the applicability of which to a given hiring agreement is not affected by extrinsic evidence, the opportunity afforded in this case to present written argument on the issue satisfied the requirements of a fair hearing. See *Yakus* v. *United States*, 321 U.S. 414, 435; *Federal Communications Commission* v. *W.J.R.*, 337 U.S. 265, 274–275; *Fay* v. *Douds*, 172 F. 2d 720, 725 (C.A. 2).

(*b*). The view of the court below that the Board has made an unwarranted retroactive application in this case of its *Mountain Pacific* doctrine conflicts with the decision of the Court of Appeals for the First Circuit in *National Labor Relations Board* v. *Local 176 United Brotherhood of Carpenters*, 276 F. 2d 583 (C.A. 1). There, as here, the Board applied its decision in *Mountain Pacific* to an exclusive hiring agreement, which, under then existing Board decisions, was valid at the time of execution. Rejecting the contention that this application was improper because of its retroactive effect, the First Circuit observed that, "If this determination of the Board was retroactive, it was no more so than whenever a court of law decides, on further consideration, to modify earlier views." 276 F. 2d at 586. See also, *Leedom* v. *Local 108, International Brotherhood of Electrical*

Workers (C.A.D.C.), decided March 24, 1960, 45 LRRM 2905.

The determination that the Board may not follow its decision in *Mountain Pacific* in cases involving pre-existing hiring agreements, moreover, transcends this case. The same retroactivity problem is inherent in the two cases already before this Court involving the *Mountain Pacific* doctrine (*supra*, p. 10), as well as in the other similar cases decided by the Board, some of which are now pending in the courts of appeals (see the Board's petition for certiorari in No. 75, p. 13).

Finally, the determination that the Board is precluded from finding hiring agreements predating the *Mountain Pacific* decision to be unlawful by virtue of the principles enunciated in that decison is manifestly erroneous. As the court below recognizes (*infra*, p. 26), the retroactive effect on an existing contract of a change in decisional law does not preclude application of the new rule to the contract where it may fairly be said that the policy considerations underlying the change in decision are not over-balanced by any undue hardship to the contracting parties. See *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 203. The continued maintenance of hiring agreements in derogation of the Act's guarantee against discrimination in employment infringes one of the Act's basic policies. The inconvenience to parties to existing contracts resulting from a renegotiation of the hiring provisions to comport with lawful requirements does not outweigh the desirability of preventing further unlawful discriminatory treatment of job applicants.

CONCLUSION

The petition for a writ of certiorari should be granted, or, in the alternative, held in abeyance pending decision of Nos. 64 and 75.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
DUANE B. BEESON,
Attorney,
National Labor Relations Board.

JULY 1960.

APPENDIX

In the United States Court of Appeals for the Sixth District

No. 13936

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

E & B BREWING COMPANY, INC., AND DRIVERS AND HELPERS LOCAL NO. 38, INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK & DISTILLERY WORKERS OF AMERICA, AFL-CIO, RESPONDENTS

Decided April 5, 1960

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before SIMONS and POPE, *Circuit Judges*, and KENT, *District Judge*

POPE, *Circuit Judge:*

The petitioning Board seeks enforcement of its order finding that in the discharge of one Pfeifle, an employee, both the respondent Company and the respondent Union had been guilty of unfair labor practices,[1] and ordering Pfeifle's reinstatement with compensation for loss of certain back pay.

[1] The charge was that the Company violated § 8(a)(3) and the Union § 8(b)(2) and 8(b)(1)(A) of the National Labor Relations Act (61 Stat. 136, 65 Stat. 601, 29 U.S.C. §§ 151, et

The examiner refused to credit testimony of Pfeifle that he had been discharged at the instance of the Union because of non-union membership. He found that the sole reason for the discharge was the Union's insistence "upon compliance by the Company with the hiring hall clause of its contract,"[2] that Pfeifle had

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seq.), the relevant portions of said Act here applicable being as follows:

"Rights of Employees—§ 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

"Unfair Labor Practices—§ 8(a)—It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § 7;

"(2) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in § 7; * * *

"(2) to cause or attempt to cause an employer to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; * * *"

[2] This clause in the collective bargaining agreement between the Company and the Union was as follows: "The employer agrees that in the event he shall require additional employees in the classifications of employment covered by this agreement, he shall notify the employment office operated by the Union. In the event that said employment office is unable to supply

attempted "to secure preferential treatment" and "sought to circumvent the legal and regularly required employment procedures" under which new employees must be engaged through the hiring hall; that the hiring hall "was being run in a nondiscriminatory manner," and he recommended that the complaint be dismissed as to both respondents.

The Board reviewed the rulings made by the examiner at the hearing, and affirmed them. On consideration of the Intermediate Report and the entire record the Board decided that it "hereby adopts the findings of the Trial Examiner but not his conclusions or recommendations." It then concluded that the Company and the Union had violated the sections of the Act previously referred to in maintaining their hiring hall agreement, holding that "an exclusive hiring hall contract was unlawful unless it explicitly provided for three safeguards" of the sort prescribed in the Board's opinion in *Mountain Pacific Chapter of the Associated General Contractors, Inc., et al.*, 119 N.L.R.B. No. 126A, handed down subsequent to the Intermediate Report in this case.

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help satisfactory to the employer within twenty-four (24) hours following the request, the employer shall be free to hire in the open market. If a vacancy must be filled immediately, the employer shall nevertheless notify the employment office and if satisfactory help cannot be supplied to meet the employer's requirement the employer may hire from the open market but before filling the vacancy permanently he shall consider applicants referred by the Union within said twenty-four (24) hours. The facilities of the employment office operated by the Union shall be made available to both members and non-members of the Union and the Union warrants that in the operation of said employment agency and referrals to the employer, it will not discriminate against any individual applicant for employment because of non-membership in the Union, or otherwise restrain or coerce such applicant because of non-membership in the Union."

The first infirmity in the Board's conclusion is that the decision in *Mountain Pacific,* on which it relies, was held erroneous in *N.L.R.B.* v. *Mountain Pacific Chapter of Assoc. Gen. Con.,* 9 Cir., 270 F. 2d 425, where the Board's petition for enforcement of that order was denied. The decision of that case that such a hiring-hall agreement, either with or without the so-called "safeguards" or "protective clauses", is not per se illegal, has been further restated and re-emphasized by that court in *Morrison-Knudsen Co.* v. *National Labor Relations Board,* 9 Cir., —— F. 2d—— (February 19, 1960). This court, in *National Labor Relations Board* v. *F. H. McGraw & Co.,* 6 Cir., 206 F. 2d 635, 640, 641, recognized the same rule, citing with approval two of the cases which the Ninth Circuit decisions followed.[3] Such is the general rule stated by the courts. Other decisions, in accord, are cited in *Morrison-Knudsen,* supra. The only case indicating a contrary rule is that of a divided court in *Local 357, International Brotherhood of Teamsters, Etc.* v. *National Labor Relations Board,* D.C. Cir., ——F. 2d —— (February 18, 1960). The majority opinion, which neither states the facts nor discusses the law, does not appeal to us.

The Board acknowledges that its practice and rulings heretofore, at least prior to its *Mountain Pacific* ruling, have proceeded upon the theory that "we have not found a provision that personnel be secured through the offices of a union violative of the Act absent evidence that the union unlawfully discrimi-

[3] *National Labor Relations Board* v. *Swinerton,* 9 Cir., 202 F. 2d 511; *Del E. Webb Construction Co.* v. *National Labor Relations Board,* 8 Cir., 196 F. 2d 841, 846. In our *McGraw* case the hiring agreement on its face gave preference to union members. Hence the finding of unfair labor practices was upheld.

nated in supplying the Company with personnel." (The quotation is from *The Hrnkin-Conkey Construction Company*, 95 N.L.R.B. 433, 435.)[4] As the Board puts it, its prior practice "was to correct hiring hall abuses as they arose in individual cases, rather than to treat the hiring hall itself." Now, however, the Board tells us it finds its prior rulings to be unsatisfactory. It says that the legality of exclusive hiring halls "had not been comprehensively treated by the Board in its decisions prior to *Mountain Pacific*."

The Board explains at great length why it believes a new approach and a new rule is necessary. It says its old "case-to-case method" where the Board always "predicated its decision upon the existence of discriminatory practices apart from the effect of the contract" was "no longer sufficient", it had proven ineffective so that now it was necessary to "deal with the legality of hiring halls on a comprehensive basis."[5] This comprehensive basis involves the Board's determination here, in the words of its brief, that "the undeniably discriminatory result of the exclusive hiring hall flows as much from the agreement itself as

[4] That rule, as stated by the courts, has been: "It is not illegal for an employer to rely upon a union to provide it with employees" (*National Labor Rel. Bd.* v. *International Assn., Etc.*, 1 Cir., 261 F. 2d 347, 350); "[t]he factor in a hiring hall arrangement which makes the device an unfair labor practice is the agreement to hire *only* union members referred to the employer." (*Del E. Webb Const. Co.* v. *National Labor Relations Bd.*, 8 Cir., 196 F. 2d 841, 845.)

[5] The Board's brief lists at great length cases which it says demonstrate that the Board's case by case effort to treat the "specific abuses only", resulted merely in a continued open flouting of the Act's prohibitions against compulsory unionism; that "in case after case, unions continued to accord preference to members even after Board orders forbidding them to do so", and even "after the Board's orders had been enforced by the Courts of Appeals."

from the illegal operation of the halls of some unions," and that "illegal discrimination against nonmembers is inherent in the hiring provision itself."[6]

As we understand the Board's position, it is that its experience proves that its effort to pick off the sour fruit frequently appearing on the hiring hall tree has been ineffective and altogether frustrating, so now it proposes to chop down the whole tree whenever it is not propped up by the Board's three "protective clauses."[7]

That the rule here contended for is a new one is noted by the Board's statement in its brief: "The case at bar is the first case in which the Board has explicated to this Court its reasons for finding that an exclusive hiring agreement violates the Act even though it may not on its face give preference in employment to members."

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[6] Says the Board: "Simply stated, on the face of the exclusive hiring agreement the employer agrees to discriminate by refusing to hire an applicant or by discharging an employee who does not go to the union hall or follow the union's hiring procedures."

[7] In its original *Mountain Pacific* decision, 119 N.L.R.B. at 897, the Board ruled that an exclusive hiring hall agreement must contain the following protective clauses:—"(1) Selection of applicants for referral to jobs shall be on a nondiscriminatory basis and shall not be based on, or in any way affected by, union membership, by laws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies, or requirements. (2) The employer retains the right to reject any job applicant referred by the union. (3) The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring agreement."

The agreement involved in this case included clauses (1) and (2). Only (3) was missing.

There is no doubt that the Board has power, in appropriate cases, and in furtherance of its delegated function of making the National Labor Relations Act work, to establish new rules. What may be called new rules may stem from two sources or theories of power. One is the broad grant of power in § 6 of the Act (29 U.S.C. § 156) authorizing the Board "to make * * * in the manner prescribed by the Administrative Procedure Act such rules and regulations as may be necessary to carry out the provisions of this subchapter." The manner prescribed by the Administrative Procedure Act is stated in §§ 3 and 4 of that Act (5 U.S.C. §§ 1002, 1003), and calls for appropriate publications in the Federal Register, and in some cases for notice and an opportunity to be heard. Perhaps the Board might have saved itself a lot of trouble by utilizing this method of making a rule. At any rate, plainly it did not call on this source of power.

A second mode by which new rules sometimes come into being is through the process of administrative adjudication. Just as courts generally do not hesitate to announce new rules to govern novel or changed conditions, so administrative boards often lay down new so-called "interpretative" rules. What the Board is authorized to interpret is the provision of § 8(a)(3) condemning discrimination in regard to hire which, in the language of Radio Officers v. Labor Board, 347 U.S. 17, 48, has "a tendency to encourage" membership in a union.

We disclaim any suggestion that because, in past years, the Board has never held that an exclusive hiring-hall agreement, on the face of it, has such a tendency, it may not now, through a proper adjudicatory process, rule that it does indeed have such a tendency. "One of the purposes which lead to the

creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration." Republic Aviation v. Labor Board, 324 U.S. 793, 800. And the Board's first interpretative decision does not have to be the final one.[8]

But while we have no occasion here to doubt that an administrative board, may, as the courts have always done, declare new rules through a process of case to case adjudications, yet we think this Board has not properly done so in this particular case, and that for two separate and distinct reasons.

First, without considering whether such is a requirement of due process, we note that § 5 of the Administrative Procedure Act (5 U.S.C. § 1004) provides that "In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing * * * (a) Persons entitled to notice of an agency hearing shall be timely informed of * * * (3) the matters of fact and law asserted." Here there was not only no complaint charging that the hiring hall agreement was illegal, or that, in the words of the Board's belated position, "illegal discrimination against nonmembers is inherent in the hiring provision itself", but it was ruled, both by the examiner and the Board itself, that the validity of the hiring hall was not in issue.[9]

[8] "Hence we refuse to say that the Commission * * * was forbidden from utilizing this particular proceeding for announcing and applying a new standard of conduct." *Securities Comm'n* v. *Chenery Corp.*, 332 U.S. 194, 203.

[9] The ruling of the examiner appears in a footnote to the Intermediate Report, as follows: "After having rested his case and during the cross-examination of a union witness, the General Counsel suddenly sought to show an illegal administration of the

We hold that the Board cannot establish its attempted rule by an adjudication of a matter not in issue before it. In the absence of the statutory notice

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hiring hall. As the complaint against the Union contained no allegation of such an unfair labor practice and as no evidence to that effect had been adduced during the General Counsel's case-in-chief, the undersigned ruled the proposed attack on the hiring hall as such incompetent. During the colloquy following this ruling, the General Counsel appeared to agree with said ruling when he stated: 'We are not trying to throw out the whole hiring hall. We are saying there was discrimination with respect to the individual himself.'" The matter then referred to appears in the transcript of the hearing as follows:

"Trial Examiner: Are you attacking the hiring hall in this case? Mr. Corenman: Yes, we are. We are contending it is a discriminatory hiring hall. Mr. Paradise: Mr. Trial Examiner, if he is, he has rested his case. He hasn't put in any proof on it, and I don't think he can now. Mr. Corenman: I think we have ample proof to argue this case. Trial Examiner: I didn't see anything in the complaint that led me to believe there was any attack on the hiring hall. If you can show it to me, I'll be—— Mr. Corenman: Yes, I'll be glad to do that, Mr. Examiner. Trial Examiner: This is the first I've recognized there was an attack on the hiring hall.

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"Mr. Paradise: Mr. Trial Examiner, I want to press my objection, in part (apart) from the fact that I agree with you, there is no attack on the hiring hall in this complaint. The General Counsel has rested his case. He has put in his evidence on the hiring hall. This witness was not questioned about the referral practices of the union in his direct testimony. There is absolutely no warrant for counsel for the General Counsel roping (reopening) this case on cross-examination on the hiring hall issue. Trial Examiner: What evidence is there in your case in chief as to the attack on the hiring hall? Mr. Corenman: Mr. Examiner, the evidence is Pfeifle himself was not referred to the job because he had been expelled from the union for letting his withdrawal card lapse, and they were not referring him for that reason. Pfeifle has so testified, and so did Rieg. And, furthermore, Pfeifle was also being discriminated against in the discriminatory operation referral system in that they were making an exception of Pfeifle

of "the matters of fact and law asserted" the Board lacked power to pass upon any such issue as that now tardily argued in its briefs.[10]

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and would not refer him, would not in any case refer him to the E & B Brewery, because that was his last employer when his withdrawal expired and he was expelled, and we have testimony on that score from both Pfeifle and Rieg. Trial Examiner: I don't understand that as an attack on the hiring hall. Mr. Corenman: That shows the hiring hall was discriminatorily administered with respect to Pfeifle. If it was discriminatorily administered with respect to Pfeifle, then, of course, there is a violation of section 8(b)(2) and section 8(a)(3). Trial Examiner: That doesn't bring the whole hiring hall into the question. I'll sustain your objection. Mr. Corenman: We are not trying to throw out the whole hiring hall. We are saying there was discrimination with respect to the individual himself. Trial Examiner: I'll take any evidence you have on discrimination as far as Pfeifle is concerned, but as far as going into the hiring hall, I see no reason to go into it. Mr. Corenman: Mr. Examiner, when counsel attempts to bring in evidence that he has a non-discriminatory hiring hall, I think I am entitled to attack it whenever he brings it into issue with his own testimony. Mr. Paradise: I haven't brought that in with this witness at all. Trial Examiner: I don't believe it's been brought in. I'll sustain the objection. You may proceed."

Said the Board: "The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The ruling are hereby affirmed."

The Board's brief here concedes that "the validity of the contract was not an issue at the hearing." See *Morgan* v. *United States*, 304 U.S. 1, 18: "Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

[10] The Board attempts to avoid this result by two arguments, both specious. First, it says that after the Intermediate Report here the Board's decision in *Mountain Pacific* came down, and then the General Counsel filed a brief with the Board in this case urging that the contract here was invalid under *Mountain Pacific*. The Board says that although the Union then urged that the

There is a second reason why we think the Board cannot apply its newly conceived rule in this case. This becomes apparent when it is noted what the Board is trying to do here. In an effort to minimize the effect of the Board's order its brief contains some statements which are not quite consistent with its main argument. Thus it says: "The only substantial affirmative action [the order] imposes upon either party is that it requires the reinstatement of Pfeifle with back pay." It says "the Board is not requiring the Company or the Union to insert any clauses in their contract." And in response to the Union's argument that the *Mountain Pacific* Rule may not be applied retroactively to the instant case, the brief says that "the only portion of the Board's order which has any retroactive effect is that which requires respondents to make Pfeifle whole for any loss he may have suffered by reason of the discrimination against him."

Nothing could be more unrealistic. For Pfeifle, although only one man, furnishes the test case through which the Board now seeks to procure an adjudication that the respondents were guilty of an unfair labor practice solely and only because their hiring-hall contract, perfectly legal and valid according to the Board's settled rule at the time it was made, has now, retroactively, been adjudged per se illegal for want of one of the Board's three protective clauses demanded

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Board could not properly consider that argument because the validity of the hiring hall provision had not been litigated, "it did not question the validity of the [*Mountain Pacific*] decision itself." Secondly, it says, respondents did not assert they had any evidence to adduce with respect to the *Mountain Pacific* issue.

Since the Board was without power to consider any such issue, it is hard to perceive why the Union was called upon to debate the *Mountain Pacific* case, or to offer evidence on a non-existent issue.

under its new ruling. The Board's doctrine would retroactively invalidate every union contract which contains an exclusive hiring hall provision. If the Board's order stands, it is doubtful if even the Board can say how many hundreds or thousands of employers and unions are, as of now, guilty of similar unfair labor practices.

It is not suggested that under no circumstance may an administrative ruling apply retroactively. Indeed, as suggested in *Securities Comm'n* v. *Chenery Corp.*, 332 U.S. at 203, any "case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency." But in particular cases, for a board to make its new ruling retroactive may well be an abuse of discretion. And this court, under the Administrative Procedure Act, § 10(e) (Title 5 § 1009(e)) is required to "hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion * * *." We think the sound principle applicable is that stated in *National Labor Rel. Bd.* v. *National Container Corp.*, 2 Cir., 211 F. 2d 525, 534, as follows: "It is well settled that where, as here, an administrative agency in pursuance of its adjudicatory function makes an *ad hoc* change in one of its administrative policies, such change may be applied retroactively in an appropriate case. *Securities and Exchange Comm.* v. *Chenery Corp.*, 332 U.S. 194. * * * The test is whether 'the practical operation of the Board's change of policy * * * [will] work hardship upon respondent altogether out of proportion to the public ends to be accomplished.' *N.L.R.B.* v. *Guy F. Atkinson Co., supra*, [195 F. 2d 149] * * *" This is in accord with the limitations upon retroactivity which were recognized in the *Chenery Corp.* case, supra, where it was noted that "ill effect of the retro-

active application of a new standard" must be balanced against the necessities of the public. In weighing these matters here we are impressed with the fact that there appears no reason why the public interest demands that the new rule be imposed at once, and now, as to this particular contract.

We are of the opinion that here, as in the case of *N.L.R.B.* v. *Guy F. Atkinson Co.*, 9 Cir., 195 F. 2d 141, 149, 151, from which the Second Circuit quoted, the Board's change of rules would work hardship upon respondents "altogether out of proportion to the public ends to be accomplished." As we have noted above, the Board has ample ways of instituting new rules without working any such hardship on these particular respondents.

We hold that its attempted retroactive action here was, in the words of the *Atkinson* case, supra, "agency action which we are directed by § 10 of the Administrative Procedure Act to set aside as arbitrary, capricious, and an abuse of discretion."

Enforcement of the Order is denied, and the Order is set aside.

DECREE

(Filed April 5, 1960)

On Petition for Enforcement of an Order of the National Labor Relations Board.

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On Consideration Whereof, It is now here *ordered*, and *adjudged* and *decreed* by this Court that the petition for enforcement be and it is denied, and the order

of the National Labor Relations Board is hereby set aside.

Approved for entry:

[s] WALTER L. POPE,
United States Circuit Judge
(sitting by designation).

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